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# Law's Beatitude: A Post-Nietzschean Account of Legitimacy Symposium: Nietzsche and Legal Theory (Part I)

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# LAW'S BEATITUDE: A POST-NIETZSCHEAN ACCOUNT OF LEGITIMACY

*Richard K. Sherwin\**

My subject is law's legitimacy. In the aftermath of September 11th, the issues before us are not simply academic. How could they be when, in a climate of violence, one of the questions pressing upon us is how the rule of law is different from the rule of violence?

Once the question of law's legitimacy is raised, the reality of violence cannot be avoided. Walter Benjamin understood this. As he noted, law has an "interest in a monopoly of violence."<sup>1</sup> In violence law originates, and in violence it conserves its ruling authority. Violence marks the origin of the state, and its demise.

We can go further. In violence the messianic moment breaks forth into the continuum of history.<sup>2</sup> The claim of justice explodes law's temporal deceptions.<sup>3</sup>

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<sup>1</sup> 1 WALTER BENJAMIN, *Critique of Violence*, in *SELECTED WRITINGS*, VOLUME 1, 1913-1996, at 236, 239 (Marcus Bullock & Michael W. Jennings eds., 1996); see also MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIETY* 314 (Guenther Roth & Claus Wittich eds., 1978) ("Today legal coercion by violence is the monopoly of the state.").

<sup>2</sup> See Walter BENJAMIN, *Theses on the Philosophy of History*, in *ILLUMINATIONS* 253, 261 (Hannah Arendt ed., Harry Zohn trans., 1969) [hereinafter BENJAMIN, *ILLUMINATIONS*]. Benjamin distinguishes between divine (or messianic) violence and mythic violence. See, e.g., BENJAMIN, *supra* note 1, at 245 ("[T]here is a sphere of human agreement that is nonviolent to the extent that it is wholly inaccessible to violence: the proper sphere of 'understanding,' language."). More specifically (albeit cryptically), Benjamin states: "Mythic violence is bloody power over mere life for its own sake; divine violence is pure power over all life for the sake of the living." *Id.* at 250.

<sup>3</sup> See Richard K. Sherwin, *Law, Violence, and Illiberal Belief*, 78 *GEO. L. J.* 1785, 1808 (1990):

[E]very meaning contains within it the contingency and deceit of social structure . . . . [T]he deceit (or 'made-up' aspect) of meaning and its conceit (*viz.*, the denial of partiality) are present in discourse even when interpretation falls short of coercive (or imperial) enactment. If this is so, then the totalization of any meaning cannot but also reflect the totalization of its deceit.

*Id.*

But what do we know (what can we know) of such claims? Is it Robespierre's terror, or some other terror, closer to home, a terror authorized by a metaphysical or theological claim that dares to link human violence and infinite justice?<sup>4</sup>

Little did I imagine when I began this meditation on law's legitimacy that I would need to grapple with words uttered by the president of the United States. Who would have thought that an American president might implicate Nietzsche's pivotal idea, the will to power? But that is precisely what happened when President Bush addressed the nation following the terrorist attacks upon the World Trade Center in New York City. Here are the words the president used to describe the perpetrators of those terrible acts: "By sacrificing human life to serve their radical visions—by abandoning every value except *the will to power*—they follow in the path of fascism, and Nazism, and totalitarianism."<sup>5</sup>

I believe that this linkage between terrorist violence and the will to power is mistaken, but not accidental. It is mistaken, as I shall presently explain in more detail, because Nietzsche's thinking about the will to power, properly understood, is precisely the opposite of metaphysical violence. This mistake may not be accidental to the extent that it reflects the speaker's adoption of metaphysical ideas.<sup>6</sup>

My objective here is an urgent one. I seek not only to

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<sup>4</sup> "Operation Infinite Justice" was the ill-advised code name first assigned to the United States's military action against Taliban and Al Qaeda forces in Afghanistan, in response to terrorist attacks upon the Pentagon in Washington, D.C. and the World Trade Center in New York City on September 11, 2001. The shift to "Operation Enduring Freedom" came in recognition of the fact that Muslim countries taking part in the American-led response to terrorism could take offense at a claim of "infinite justice" which, according to Islamic belief, is the exclusive province of God. See Surin Pitsuwan, *Words and Symbols Carry Weight*, BANGKOK POST, Oct. 2, 2001, available at [http://scoop.bangkokpost.co.th/bkkpost/2001/october2001/bp20011002/news/02oct2001\\_news19.html](http://scoop.bangkokpost.co.th/bkkpost/2001/october2001/bp20011002/news/02oct2001_news19.html).

<sup>5</sup> President George W. Bush, *Address to a Joint Session of Congress and the American People*, (Sept. 21, 2001), available at [www.whitehouse.gov/news/releases/2001/09.html](http://www.whitehouse.gov/news/releases/2001/09.html).

<sup>6</sup> See *Infinite Justice, Out-Enduring Freedom*, In, BBC News (Sept. 25, 2001), available at <http://news.bbc.co.uk/2/hi/world/americas/1563722.stm> ("In unscripted remarks to journalists on the White House lawn last week [September 15, 2001], Mr. Bush said: 'This crusade, this war on terrorism, is going to take a while.'"). The term "metaphysics" in this context refers to a flight from the here and now of lived reality—what Freud refers to as the reality principle—into a domain of idealized or "eternal" essences. See FRANZ ROSENZWEIG, *UNDERSTANDING THE SICK AND THE HEALTHY* 40-41 (1999) (describing the metaphysical philosopher who "separates his experience of wonder from the continuous stream of life, isolating it . . . . The true concern of the philosopher is with the 'essence' . . . . The singleness and particularity . . . of the subject detached from time is transformed into a statement of its particular essence . . ."). See also EMMANUEL LEVINAS, *TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY* 33 (1969) ("'The true life is absent.' But we are in the world. Metaphysics arises and is maintained in this alibi. It is turned toward the 'elsewhere' . . .").

extricate Nietzsche's highest thought from confusion, but also to rescue law's legitimacy from the grip of metaphysical beatitude. If law finds legitimacy in beatitude, and I shall contend that it does, then we must learn to distinguish between the joyous excess and life affirmation that characterize Nietzsche's beatitude from the pathology of denial, nihilism, and resentment that characterize metaphysical beatitude. The difference is a matter of life and death.

## I. METAPHYSICAL BEATITUDE

Metaphysical beatitude begins in denial. It signals a rebellion against life. Franz Rosenzweig wrote about this experience in 1921. He described it as the paralysis of "sick reason."<sup>7</sup> It is what happens when one catches the disease of metaphysics—that pathological obsession with essences. "Common sense is crippled by a stroke."<sup>8</sup>

Within a year after Rosenzweig penned those words, Franz Kafka conjured a world of sick reason in a parable of alienation and disenchantment. In his novel *The Castle*,<sup>9</sup> only the necessity of authority remains; its significance has been lost.<sup>10</sup> In the midst of Kafka's bureaucratic labyrinth, law retains validity but lacks meaning. The source of law's legitimacy is no longer apparent. We have been cut off.<sup>11</sup>

The same year, 1921, Walter Benjamin wrote: "[I]n the exercise of violence over life and death, more than in any other legal act, the law reaffirms itself. But in this very violence

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<sup>7</sup> ROSENWEIG, *supra* note 6, at 42.

<sup>8</sup> *Id.*

<sup>9</sup> FRANZ KAFKA, *THE CASTLE* (Willa & Edwin Muir et al. eds., definitive ed. 1954) (1930). See *THE CAMBRIDGE COMPANION TO KAFKA* xix (Julian Preece ed., 2002) (noting that Kafka commenced writing *The Castle* in the first month of 1922 and ceased working on it seven months later).

<sup>10</sup> See GERSHOM SCHOLEM, *THE CORRESPONDENCE OF WALTER BENJAMIN AND GERSHOM SCHOLEM 1932-1940*, at 142 (G. Scholem ed., Anson Rabinbach trans., 1992) (describing the "nothingness of revelation" as "a state in which revelation appears to be without meaning, in which it still asserts itself, in which it has *validity* but *no significance*").

<sup>11</sup> See ERIC L. SANTNER, *ON THE PSYCHOTHEOLOGY OF EVERYDAY LIFE: REFLECTIONS ON FREUD AND ROSENZWEIG* 38-39 (2001) (linking the "nothingness of revelation" with trauma—"a breakdown in meaning" that leaves the mind "possessed or haunted, under the 'ban' of something that profoundly matters without . . . anything resembling an orientation in the world"); see also WEBER, *supra* note 1, at 506 ("As intellectualism suppresses belief in magic, the world's processes become disenchanting, lose their magical significance, and henceforth simply 'are' and 'happen' but no longer signify anything.").

something rotten in law is revealed.”<sup>12</sup> “What manifests itself,” as Eric Santner astutely observes:

[I]s the fact that the rule of law is, in the final analysis, without ultimate justification or legitimation, that the very space of juridical reason within which the rule of law obtains is established and sustained by a dimension of force and violence that, as it were, holds the place of those missing foundations.<sup>13</sup>

In this view, the “mystical foundation of authority,” to cite Jacques Derrida’s gloss on Montaigne’s phrase,<sup>14</sup> remains a mystery, or worse, a repressed trauma of unjustifiable violence.<sup>15</sup>

Writing in the aftermath of the First World War, Kafka, Rosenzweig, and Benjamin were grappling with the pervasive effects of profound trauma. So, too, was Sigmund Freud,<sup>16</sup> whose *Beyond the Pleasure Principle* appeared in 1920.<sup>17</sup> He too described sick reason and the loss of meaning. In psychoanalytic terms, trauma occurs when there is a “hyper-cathexis” (or over-investment) of excess unbound psychic energy. According to Freud, this causes a breakdown in the pleasure principle. Instead of seeking pleasure in the reduction of tension, the neurotic compulsively returns to the source of trauma, the un-metabolizable stimulus that simultaneously resists meaning and defeats denial. The patient feels compelled to repeat the repressed material as a contemporary experience, acting out fantasized causes and justifications, instead of remembering the real stimulus as something belonging to the past.<sup>18</sup>

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<sup>12</sup> BENJAMIN, *supra* note 1, at 242.

<sup>13</sup> SANTNER, *supra* note 11, at 56-57.

<sup>14</sup> JACQUES DERRIDA, *Force of Law: The “Mystical Foundation of Authority”*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3, 12 (Drucilla Cornell et al. eds., 1992) (“*Here Montaigne is clearly distinguishing laws, that is to say droit, from justice. The justice of law, justice as law is not justice. Laws are not just as laws. One obeys them not because they are just but because they have authority.*”).

<sup>15</sup> *Id.* at 14 (“Since the origin of authority, the foundation or ground, the position of the law can’t by definition rest on anything but themselves, they are themselves a violence without ground.”). Cf. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 51 (Daniel Heller-Roazen trans., 1995) (“*Being in force without significance (Geltung ohne Bedeutung)*: nothing better describes the ban that our age cannot master than Scholem’s formula for the status of law in Kafka’s novel.”). See SANTNER, *supra* note 11, at 54 (linking “pure necessity without meaning” with “the nothingness of revelation”).

<sup>16</sup> See, e.g., 18 SIGMUND FREUD, *Psychoanalysis and Telepathy*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 177 (James Strachey & Anna Freud trans., 1955) (describing the “loss of value by which everything has been affected since the world catastrophe of the Great War” and the corresponding attempt to compensate for the “attractions which have been lost by life on this earth” by “making [it] up in another, a supermundane, sphere . . .”).

<sup>17</sup> See *id.* at 7-64.

<sup>18</sup> *Id.* at 29-30; see also EMMANUEL LEVINAS, *COLLECTED PHILOSOPHICAL PAPERS* 180 (Aphphonso Lingis trans., 1986) (“In its malignancy as evil, evil is an excess . . . . The

Trauma, it turns out, takes us beyond the pleasure principle into the realm of death, or perhaps more accurately, of death in life. Sick reason compels obsessive repetition of a repressed excess that resists expression. The patient is consequently transported to a realm of fantasy, for it is fantasy alone that now sustains any sense of order or consistency or place. Life is thus lost in the living.

In the face of death, and the terror that it holds for us, we encounter the metaphysical temptation. Sick reason seeks a way out of life, an escape from the terror of mortality. This is the fateful gift of metaphysical philosophy that Rosenzweig describes in *Understanding the Sick and the Healthy*:

Man, chilled in the full current of life, sees . . . death waiting for him. So he steps outside of life. If living means dying, he prefers not to live. He chooses death in life. He escapes from the inevitability of death into the paralysis of artificial death.<sup>19</sup>

Philosophy conspires with this state of denial. As Rosenzweig writes:

Philosophy might well have swallowed [death] up into the night of the Nought, but it could not tear loose its poisonous sting. And man's terror as he trembles before this sting ever condemns the compassionate lie of philosophy as cruel lying.<sup>20</sup>

In the grip of metaphysical beatitude, sick reason is haunted by an insatiable phantom—a Dybuk, the soul's dark double, product of repressed forces. Dead, yet living, the phantom cries out to us, like Lucy in Bram Stoker's *Dracula*, "[c]ome to me . . . My arms are hungry for you."<sup>21</sup> But upon hearing her voice, our blood turns cold. There is "something of the tingling of glass when struck" in her diabolically sweet tones. It is the sweetness of eros captured by death. To yield to the call of the undead is to embrace death itself.

This retreat from life, this capture of the soul in the night of the Nought, lies at the heart of what Nietzsche described as the spirit of decadence, and what Freud diagnosed as the pathology of death anxiety. It is not the will to power, but rather the will to destruction. As Nietzsche wrote, "[m]an would rather will nothingness than not will."<sup>22</sup>

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'quality' of evil is this very non-integrability . . .") [hereinafter LEVINAS, COLLECTED PHILOSOPHICAL PAPERS].

<sup>19</sup> ROSENZWEIG, *supra* note 6, at 102; see also SANTNER, *supra* note 11, at 13 ("The pursuit of the end of the world [is] . . . fundamentally fantasmatic.").

<sup>20</sup> FRANZ ROSENZWEIG, *THE STAR OF REDEMPTION* 4-5 (William W. Hallo trans., 1971) [hereinafter ROSENZWEIG, *REDEMPTION*].

<sup>21</sup> BRAM STOKER, *DRACULA* 203-04 (2001).

<sup>22</sup> FRIEDRICH NIETZSCHE, *THE GENEALOGY OF MORALS*, Third Essay para. 28, at

The fanatic exhibits a similarly decadent will. Here, too, we encounter the will to metaphysical beatitude. Rather than enter into the midst of life, the fanatic, like the nihilist, like the patient caught in denial, seeks to annihilate suffering for the sake of a world to come. The will to annihilation would rather will nothingness than not to will at all. Thus, the fanatic says "No" to life that is corrupt, stained with suffering and injustice.<sup>23</sup>

Nietzsche well understood the fanatic will. "Love of *one*," he wrote, "is a barbarism: for it is exercised at the expense of all else."<sup>24</sup> The ecstasy of evil relieves intolerable suffering at the highest cost, the cost of death and sacrifice, the cost of a sublime cruelty. This is, as Henry Birault writes:

the price of an excess of suffering, a suffering 'more profound, more inward, more poisonous, more deadly—but calming, reassuring, redemptive in spite of everything; because through it the primal pain of life is finally interpreted, justified, systematized, ordered, put into perspective: into the perspective

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163 (Walter Kaufman & R. J. Hollingdale trans., 1969).

<sup>23</sup> See BENJAMIN, *supra* note 1, at 251 ("If I do not kill, I shall never establish the world dominion of justice . . . that is the argument of the intelligent terrorist."). Dostoyevski's character, Kirilov, in *The Possessed* articulates a similar sentiment: "Life is pain, life is fear, and man is unhappy. Now everything is pain and fear . . . One day there will be . . . the new man." FYODOR DOSTOYEVSKI, *THE POSSESSED* 111 (Andrew R. MacAndrew trans., 1962). Kirilov's vision of absolute freedom is emphatically nihilistic: "I have an obligation to shoot myself because the supreme gesture of free will is to kill oneself." *Id.* at 635. In placing such nihilism beside delusional megalomania ("He who conquers pain and fear will be a god himself."), Dostoyevsky anticipates Nietzsche's thought that nihilism "might be a divine way of thinking." FRIEDRICH NIETZSCHE, *THE WILL TO POWER* para. 15, at 15 (Walter Kaufmann & R. J. Hollingdale trans., 1967) [hereinafter NIETZSCHE, *THE WILL TO POWER*]. The delusional nature of such nihilistic thinking, harkening back to Rosenzweig's and Santner's understanding of inner deadness, may be witnessed in contemporary messianic movements. See, e.g., ROBERT JAY LIFTON, *DESTROYING THE WORLD TO SAVE IT: AUM SHINRIKYO, APOCALYPTIC VIOLENCE, AND THE NEW GLOBAL TERRORISM* 210 (1999) ("This is a pattern that can be found in visionary prophets and paranoid schizophrenics . . . They may come to feel that only the world's death can enable them to overcome their own inner deadness."). According to Lifton:

Apocalyptic violence has been building worldwide over the last half of the twentieth century. Having studied some of the most destructive events of this era, I found much of what [the Japanese cult group] AUM did familiar, echoing the totalistic belief systems and end-of-the-world aspirations I had encountered in other versions of the fundamentalist self.

*Id.* at 5. See HARUKI MURAKAMI, *UNDERGROUND: THE TOKYO GAS ATTACK AND THE JAPANESE PSYCHE* 357 (Alfred Birnbaum & Philip Gabriel trans., 2001) (quoting one AUM follower as saying: "There's still this suppressed, virus-like apocalyptic vision that's invading society and hasn't been erased or digested."). Such is the fate of those who, in Levinas's words, "are reduced to being bearers of forces that command them unbeknown to themselves." LEVINAS, *supra* note 6, at 21.

<sup>24</sup> Henri Birault, *Beatitude in Nietzsche*, in *THE NEW NIETZSCHE: CONTEMPORARY STYLES OF INTERPRETATION* 219, 221 (David B. Allison ed., 1977) (quoting FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* para. 67 (1886)).

of fault . . . . The pain henceforth had a cause, a reason, an end, a why, and this *meaning* allowed the *essential* to be saved—that is, the will, at least a certain will, that which wills the meaning of suffering because first it considers suffering an accident, a stumbling block, something that is but should not be and that elsewhere, in another world, another life, another nature, would *not* be. This will, avid for meaning, we see, is at bottom a will for annihilation, a will that begins by saying “no” to existence, to our meaningless, immoral, unreasonable existence.<sup>25</sup>

Metaphysical beatitude in this sense is “only a death instinct.”<sup>26</sup> Call it revolt, or call it the undeadness that comes of unresolved death anxiety. It is, at its core, the pathological spirit of resentment (what Nietzsche called *ressentiment*<sup>27</sup>), a turning away from life.

We may recognize this nihilist revolt as the impulse behind the terrorist violence of which President Bush spoke, mistakenly identifying it with the will to power. We must not make that mistake. What the president referred to as the will to power is in reality the will to power in reverse.

The violent fantasies fueled by metaphysical beatitude—including the promise of metaphysical beatitude in the form of a final reckoning between eternal foes—take us down an inhuman path. We may fight to defend our way of life, but we cannot fight to root out fear and suffering.<sup>28</sup> As Franz Rosenzweig observed, “[a]ll that is mortal lives in [the] fear of death; every new birth augments the fear by one new reason, for it augments what is mortal.”<sup>29</sup>

## II. NIETZSCHE'S BEATITUDE

How far nihilistic thinking and the pathology of sick reason are from Nietzsche's thinking about the will to power. And here Rosenzweig and Freud are also allied in a similar kind of thinking. For theirs too is a response to sick reason, to the pathology of denial, against the paralysis of death anxiety. Their response calls

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<sup>25</sup> *Id.* at 225-26.

<sup>26</sup> *Id.* at 222.

<sup>27</sup> See NIETZSCHE, THE WILL TO POWER, *supra* note 23, para. 179, at 108-09 (describing as the “Masterstroke” of *ressentiment* its need “to deny and condemn the drive whose expression one is, continually to display, by word and deed, the antithesis of this drive”).

<sup>28</sup> See Bush, *supra* note 5 (“Freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them.”).

<sup>29</sup> ROSENZWEIG, REDEMPTION, *supra* note 20, at 3. “Man is not to throw off the fear of the earthly; he is to remain in the fear of death. . . .” *Id.* at 4.



not for a flight from, or a defense against, life, but rather for what Santner describes as the “undeading” of metaphysical fantasy—a de-cathexis or working through of the psyche’s fixation upon the traumatic excess of unbound energy.<sup>30</sup>

Only when the bond to metaphysical fantasy has been loosened may we learn to tarry with anxiety rather than take flight into a ghostly nothingness. Here is the gate through which we enter more deeply into life. But by what force are we impelled to cross over? What strength of will leads death-bound subjectivity to forge meaning in the very midst of life? But what is the will to power if not this very force?

Here lies the catalyst for supreme affirmation of this life from creative moment to creative moment. It is here that we encounter the deep joy of Nietzsche’s beatitude.<sup>31</sup> The healthy will, the will to power, is the will not to nothingness, but to more life. It is the will that wills its own growth and vitality. It is the will to surpass itself, to be more.<sup>32</sup>

“All things are entangled, ensnared, enamored . . .” Nietzsche tells us. And all joy “wants everything eternally the same.”<sup>33</sup> “To impose upon becoming the character of being . . . to preserve a world of that which is, which abides . . . . That *everything recurs* is the closest *approximation of a world of becoming to a world of being*. . . .”<sup>34</sup>

It is with good reason that Birault credits Heidegger’s observation that “[t]he Will to Power is, in its essence and

<sup>30</sup> See SANTNER, *supra* note 11, at 22-23, 33.

<sup>31</sup> Citing Plato’s *Phaedrus* (regarding the delirium that comes from God as “winged thought”), Levinas comments: “Delirium here does not have an irrationalist significance; it is only a ‘divine release of the soul from the yoke of custom and convention.’” LEVINAS, *supra* note 6, at 49. Cf. RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE 205-33 (2000) (describing enchantment in connection with an affirmative postmodern view of law). See also ELAINE SCARRY, ON BEAUTY AND BEING JUST 48 (1999) (noting that beauty in nature and in art has the capacity to lead us “to a more capacious regard for the world” which in turn prompts a twofold sense of fairness—as both comeliness and as the just and equitable); JANE BENNETT, THE ENCHANTMENT OF MODERN LIFE 4 (2001) (“[O]ne must be enamored with existence and occasionally even enchanted in the face of it, in order to be capable of donating some of your scarce mortal resources to the service of others. [J]oy can propel ethics.”).

<sup>32</sup> See FRIEDRICH NIETZSCHE, *Twilight of the Idols*, in THE PORTABLE NIETZSCHE 518 (Walter Kaufmann trans., 1968) [hereinafter NIETZSCHE, *Twilight*]. “What is essential in rapture is the feeling of enhancement of force and plenitude.” 1 MARTIN HEIDEGGER, NIETZSCHE: THE WILL TO POWER AS ART 100 (David Farrell Krell trans., 1971). As Heidegger glosses, “such enhancement of force must be understood as the capacity to extend beyond oneself.” *Id.*

<sup>33</sup> FRIEDRICH NIETZSCHE, *Thus Spoke Zarathustra*, in THE PORTABLE NIETZSCHE 434 (Walter Kaufmann trans., 1968) [hereinafter NIETZSCHE, *Zarathustra*].

<sup>34</sup> NIETZSCHE, THE WILL TO POWER, *supra* note 23, para. 617, at 330.

according to its internal possibility, the eternal return of the same."<sup>35</sup> Birault is also perspicacious in noting that Nietzsche's beatitude is the source, the beginning, rather than the goal, the phantasmal promised land, of creative thought and action. As Birault aptly puts it, "[t]he blissful man has made his peace with reality."<sup>36</sup> He has no need of, and no desire for the beyond, the unconditioned absolute. Rather than dissolve pain and suffering in some life beyond life, Nietzsche's tragic narrative affirms this life with all its suffering and vicissitudes.

The will to power culminates in the eternal return out of an excess of vitality and joy. Its affirmation is a thanking and a blessing.<sup>37</sup> As Birault writes, it:

proceeds from love, and love only, from an immense gratitude for what is, a gratitude that seeks to impress the seal of eternity on what is and what, for Nietzsche, is always only in becoming. . . . It is then that the will becomes love, without ceasing to be will and Will to Power. It is then that this love becomes the love of the necessary, "*amor fati*," without ceasing to be love and will for the contingency of the most contingent things.<sup>38</sup>

### III. LAW'S BEATITUDE

Nietzsche invites us to embrace life, to enhance the spirit of joyful creativity (the de-cathexis of traumatic excess) that links the will to power to meaning in the midst of life. This is what it means to heal sick reason. As Rosenzweig urges, "[l]et our personal experience, even though it change from instant to instant, be reality."<sup>39</sup> This is what it means to leave the fanciful realm of essences. "[A]ll turns into a black nothingness unless you color the world—yours are the tinges that illuminate it."<sup>40</sup>

But in uttering these words, Rosenzweig does more than merely echo Nietzsche's beatific excess, as expressed in the will to power. He takes a further step. He travels about, not alone with his will content to embrace the totality of things,<sup>41</sup> but in the

<sup>35</sup> Birault, *supra* note 24, at 220.

<sup>36</sup> *Id.* at 229.

<sup>37</sup> NIETZSCHE, THE WILL TO POWER, *supra* note 23, para. 775, at 406-07 ("A heightened feeling of happiness and life is also a heightened feeling of power: it is from this that man praises . . .").

<sup>38</sup> Birault, *supra* note 24, at 230.

<sup>39</sup> ROSENZWEIG, *supra* note 6, at 79.

<sup>40</sup> *Id.* at 78-79.

<sup>41</sup> See NIETZSCHE, *Zarathustra*, *supra* note 33, at 434 ("Joy, however, does not want

presence of others he meets along the way. "Whenever I encounter man," Rosenzweig writes, "I shall steep my countenance in his until it reflects his every feature . . . until I have absorbed their countenances and thus come into contact with everything that ever existed. Thus traveling about the earth, I shall come face to face with my own Self."<sup>42</sup>

With these words, Rosenzweig directs us toward a powerful gravitational field,<sup>43</sup> a field strong enough to bend the essentially aesthetic nature of Nietzsche's beatitude toward the ethical.<sup>44</sup>

What is this powerful ethical force? It is the force unleashed in the utterance of a personal name. "Suddenly, hearing his name spoken," Rosenzweig writes, "man knows that he is himself. He

heirs, or children—joy wants itself, wants eternity, wants recurrence, wants everything eternally the same." Yet, once sounded, Agamben's irrefragable rebuke, anchored in the test case of Auschwitz, reverberates:

"One day or one night," a demon glides beside a survivor and asks: "Do you want Auschwitz to return again and again, innumerable times, do you want every instant, every single detail of the camp to repeat itself for eternity, returning eternally in the same precise sequence in which they took place?" This simple reformulation of the experiment suffices to refute it beyond all doubt . . .

GIORGIO AGAMBEN, REMNANTS OF AUSCHWITZ: THE WITNESS AND THE ARCHIVE 99 (Daniel Heller-Roazen trans., 1999).

<sup>42</sup> ROSENZWEIG, *supra* note 6, at 79.

<sup>43</sup> One might suggest that what unfolds here is an attunement between two gravitational fields—between two minds, and two unconsciousnesses—the other's and the one who responds. As Santner puts it: "I want to propose that the ethics at the core of both psychoanalysis and the Judeo-Christian tradition (as interpreted by Rosenzweig) is an ethics pertaining to my *answerability to my neighbor-with-an-unconscious*." SANTNER, *supra* note 11, at 9. With regard to the receptive state of mind in question, Freud states: "Experience soon showed that the attitude which the analytic physician could most advantageously adopt was to surrender himself to his own unconscious mental activity, in a state of *evenly suspended attention* . . . to catch the drift of the patient's unconscious with his own unconscious." 18 SIGMUND FREUD, *Two Encyclopedia Articles*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 235, 239 (James Strachey & Anna Freud trans., 1955). See also the work of contemporary cognitive scientist FRANCESCO J. VARELA, ETHICAL KNOW-HOW: ACTION, WISDOM, AND COGNITION 64 (1999) (discussing ethics as the cultivation of a "know-how" concerning the unconscious). According to Varela, the "ek-static" state of mind (i.e., standing outside oneself in a selfless, non-intentional, non-deliberative, but active mindfulness) is what Buddhists refer to as *wu wei*. *Id.* at 32-33. According to Santner, this responsiveness to the other lies at "the heart of our very aliveness to the world." SANTNER, *supra* note 11, at 9. This notion of mindfulness resonates as well with Heidegger's sense of "mood" or "attunement." See HEIDEGGER, *supra* note 32, at 99 (describing mood as "a way of being attuned, and letting ourselves be attuned . . . [it] is precisely the basic way in which we are *outside* ourselves.").

<sup>44</sup> Heidegger aptly notes that "rapture is the basic aesthetic state without qualification." HEIDEGGER, *supra* note 32, at 97. But the ethical force that Levinas describes disturbs our aesthetic enjoyment. By confronting me with the irreducible "destituteness" of the other's naked countenance, the ethical obligation (to pay heed) calls into question "my joyous possession of the world." LEVINAS, *supra* note 6, at 76. Hence, the surplus shifts from the totality of contingent things (the realm of beauty) to the infinity ("the inexhaustible surplus") of the face (the realm of the ethical). See *id.* at 207.

recognizes that he has the ability to begin again. . . . At each moment the future presents to man the gift of being present to himself."<sup>45</sup> But why speak of a gift of self-presence? Because the great gift of being oneself lies in its excess—in giving oneself away.<sup>46</sup> This is what it means to respond to the countenance of the other whom one meets. It marks the ever-present prospect of a redemptive moment, the moment in which justice irrupts into time,<sup>47</sup> the moment in which one responds to the one who calls. As Emmanuel Levinas has written, it is before the face of the other that we acquire moral consciousness.<sup>48</sup>

Law can benefit from such thinking,<sup>49</sup> for law too is tempted by fantasies of flight and denial. Law too is susceptible to the pathology of metaphysical beatitude, particularly when it forgets (or denies) the violence at its core. We see such forgetfulness when law seeks refuge in certainty, in its compulsion to repeat the past, in the rigidity of precedent, which masks an unacceptable fear of illegitimacy. Then law rules with the blank stare of necessity—rather than a human countenance of meaning.<sup>50</sup>

I believe we may find a way toward law's legitimacy by confronting and working through the symptoms of sick legal reason. Linking law's legitimacy to Nietzsche's beatitude is a first step on the path to health, which is to say, away from flight and fantasy toward life as it is. But I also wish to follow Rosenzweig's lead in taking an additional step. It is the step by which we bend the aesthetic of Nietzsche's beatitude toward the ethical. This is what happens when mindfulness, the beatific overflow of affirmation, encounters the summons of the other.

<sup>45</sup> ROSENZWEIG, *supra* note 6, at 81, 82.

<sup>46</sup> See BENNETT, *supra* note 31, at 80 ("Generosity is the *active disposition of oneself*. To think this way about ethics, that is, to focus on its aesthetic-affective dimensions, is thus to ask: Under what circumstances can such magnanimous sentiment or fullness of will arise?").

<sup>47</sup> See BENJAMIN, *ILLUMINATIONS*, *supra* note 2; LEVINAS, *supra* note 6, at 22-23 ("Eschatology institutes a relation with being *beyond the totality* . . . . It is a relationship with a *surplus always exterior to the totality* . . . [It is as if] the concept of infinity . . . were needed to express this transcendence with regard to totality . . .").

<sup>48</sup> See LEVINAS, *COLLECTED PHILOSOPHICAL PAPERS*, *supra* note 18, at 183 n.11.

<sup>49</sup> See Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543, 551 (1988) ("We crave enchantment. With enchantment come belief and meaning."); Richard K. Sherwin, *Nomos and Cinema*, 48 UCLA L. REV. 1519, 1525 (2001) ("Without enchantment and belief the force of law ultimately decays into naked power alone."); see generally SHERWIN, *supra* note 31.

<sup>50</sup> See SANTNER, *supra* note 11, at 61 ("The repetition of juridical precedent is, in other words, in a quite literal sense the *compulsion to repeat*. It is precisely this dimension of repetition compulsion that defines, for Benjamin, the sphere of 'mythical violence' . . ."). See also ROSENZWEIG, *REDEMPTION*, *supra* note 20, at 177 ("Law reckons with times, with a future, with duration. The commandment knows only the moment; it awaits the result in the very instant of its promulgation.").

Along this path of thinking, I believe we shall come to appreciate anew the impact of the philosophy of becoming upon twentieth century jurisprudence. It is a topic I can only lightly and most inadequately touch upon here. But my hope is that even this brief dalliance will at least set the stage for a theory of law's legitimacy that takes Nietzsche's beatitude as its point of departure.

Under the influence of Nietzsche's powerful ideas, philosophers of process and growth such as Henri Bergson,<sup>51</sup> Alfred North Whitehead,<sup>52</sup> and John Dewey<sup>53</sup> created an influential environment for jurists such as Benjamin Cardozo, Joseph C. Hutcheson, and Karl Llewellyn.

Indeed, the very same year that saw the publication of the works that I have been discussing (by Rosenzweig, Kafka, Benjamin, and Freud) also saw the publication of Cardozo's *The Nature of the Judicial Process*.

Cardozo's book is a work of its time, steeped in ideas about immanence, growth, and creativity. For example, Cardozo writes:

All is fluid and changeable. There is an endless "becoming" . . . . In this perpetual flux, the problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle . . . . [H]e must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.<sup>54</sup>

Cardozo concludes his reflections with this observation: "I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation."<sup>55</sup>

Released from the grip of law's formality, the judge is now primed to respond to the singular demands of facts. During the late 1920s, reflecting Cardozo's, among other influences, Karl Llewellyn would take a firm stand against law's systemization. Law's best hope, he argued, lay in a shift of focus toward "a wealth of illuminating facts." By thus drawing "closer to life," as he put it, Llewellyn sought to oppose law's rigidity. "If one observes a new fact situation," Llewellyn writes, "*and is sensitive to its real-life meaning*, then there is a sudden and (so to speak) *ex post facto* change in the meaning of one's prior life experience in that area, and thus a change of content in the words used to describe and

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<sup>51</sup> See, e.g., HENRI BERGSON, CREATIVE EVOLUTION (Arthur Mitchell trans., 1911).

<sup>52</sup> See, e.g., ALFRED NORTH WHITEHEAD, PROCESS AND REALITY: AN ESSAY IN COSMOLOGY (David Ray Griffin & Donald W. Sherburne eds., 1978).

<sup>53</sup> See, e.g., JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY (1985).

<sup>54</sup> BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 28 (1921).

<sup>55</sup> *Id.* at 166.

regulate the area."<sup>56</sup>

This life-altering experience of meaning, an experience that is in turn anchored in the facts of real-life, calls to mind Wittgenstein's insistence upon a changed mode of thought or "an alteration in the mode of life of human beings"<sup>57</sup> as a cure to philosophical and, one might add, legal problems. Llewellyn's understanding of fact-based justice not only parallels Nietzsche's and Rosenzweig's similar exhortation to enter more deeply into life. It also implements the immanentist ethos in practical terms by insisting upon the exercise of creative and essentially intuitive judgment. This, it seems, is what being in the midst of life's incessant flux of events requires.

"A judge's intuition extends only as far as his experience and sensitivity," writes Llewellyn.<sup>58</sup> His statement is typical of the emerging legal realist account of process-based adjudication. This account invites us to open up to the "jump-spark connection"<sup>59</sup> of the judicial hunch. It is intuition that leads the decision-maker into the midst of life. In so doing, it underscores the singularity of each new fact situation that each new case presents. This helps to explain the high premium that Llewellyn places upon "situation sense."<sup>60</sup>

When the grip of metaphysics eases, the inclination toward closure and certainty weakens. The contingencies and uncertainties as well as the irrationality that surrounds and pervades judgment can no longer be ignored. Immanentist decision-making remains poised for a spontaneous, creative intuition of singular justice.

Like Benjamin's ("weak") messianic moment,<sup>61</sup> justice erupts

<sup>56</sup> KARL N. LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 79 (Paul Gerwitz ed., Michael Ansaldi trans., 1989).

<sup>57</sup> STANLEY CAVELL, *The Availability of Wittgenstein's Later Philosophy*, in *MUST WE MEAN WHAT WE SAY?: A BOOK OF ESSAYS* 44, 61 (1995).

<sup>58</sup> LLEWELLYN, *supra* note 56, at 79.

<sup>59</sup> Joseph C. Hutcheson, Jr., *The Judgment Intuitive—The Function of the Judicial "Hunch" in Judicial Decisions*, 14 CORNELL L.Q. 274, 278 (1929).

<sup>60</sup> See, e.g., KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 121 (5th prtg. 1976) (describing "situation-sense" as "the felt duty to justice which twins with the duty to the law . . . . [T]he balanced shrewdness of the expert in the art."). According to Llewellyn, every fact pattern carries within it those "natural rules" which are "indwelling in the very circumstances of life." *Id.* at 122 (quoting Levin Goldschmidt, but the source might just as readily have been Francois GénY in whose work the philosophy of immanence exerts an unmistakable influence). See FRANCOIS GENY, *METHODE D'INTERPRETATION ET SOURCE EN DROIT PRIVE POSITIF* (Louisiana State Law Institute trans., 2d ed. 1954).

<sup>61</sup> See BENJAMIN, *ILLUMINATIONS*, *supra* note 2, at 254 ("Like every generation that preceded us, we have been endowed with a *weak* Messianic power, a power to which the past has a claim.").

into the flux of time and events. This loosens law's rigidity and relieves it of its obsessive fantasy of control and systematic regularity. It also anchors law back in the present, relieving the pressures on law's past to predict law's future.<sup>62</sup>

In the singularity of intuitive justice, the call of the personal name obtains heightened significance. As Rosenzweig states, "[w]ith the summons by the proper name, the word of revelation [God's command: 'Love me! Love thy neighbor!'<sup>63</sup>] entered the real dialogue. With the proper name, the rigid wall of objectness has been breached."<sup>64</sup> This rupture signals the possibility of redemptive justice. It is a possibility rooted in revelation and revelation put into practice. That is to say, it embodies the immanent aspect of affirmation that we find in Nietzsche's beatitude and which Birault correlates (correctly, in my view) with a profound love for being.

In psychoanalytic terms, beatitude operates as a means of cathecting (or bonding) the unbound, excessive energy of becoming. In this way, it is a form of mastery.<sup>65</sup> By mastering unbound energy the will to power renders it accessible and meaningful. As Jean Granier says, "[f]or Nietzsche, interpretation constantly takes the value of a creative imposition of form upon matter . . . . For Nietzsche, interpretation is synonymous with imposing sense. . . ."<sup>66</sup>

Yet, there is a profound omission in Nietzsche's thought. Nietzsche seems content to let the will to power care for itself. He offers no help to one who asks what kind of community fosters or hinders such creative vitality within the individual. Nor does he speak to the question, what of the other?

To explore a theory of politics that links the will to power with a democratic polity one may productively turn to Walt Whitman,<sup>67</sup> or more recently, to the work of George Kateb.<sup>68</sup> I

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<sup>62</sup> At the same time, however, law's constraints remain in place. In this respect, law serves as a necessary counter-weight to Nietzsche's beatitude by structuring it—even within the gravitational field of obligation before the face of the other. See ROBERT M. COVER, *Bringing the Messiah Through the Law: A Case Study*, in NOMOS XXX: RELIGION, MORALITY, AND THE LAW 204 (J. Ronald Penneck & John W. Chapman eds., 1988) ("A lawful messianism entails a special form of commitment that holds to the immediacy of a privileged and strange transformation while insisting on a highly unusual capacity for familial transformational institutions.").

<sup>63</sup> *Deuteronomy* 6:5. See SANTNER, *supra* note 11, at 68.

<sup>64</sup> ROSENZWEIG, REDEMPTION, *supra* note 20, at 186-87.

<sup>65</sup> See Jean Granier, *Nietzsche's Conception of Chaos*, in THE NEW NIETZSCHE: CONTEMPORARY STYLES OF INTERPRETATION, *supra* note 24, at 140 ("The highest relation remains that between the creator and his material: that is the ultimate form of jubilation and mastery." (citing FRIEDRICH NIETZSCHE, THE GAY SCIENCE para. 58)).

<sup>66</sup> *Id.* at 135, 140.

<sup>67</sup> See, e.g., WALT WHITMAN, *Democratic Vistas*, in COMPLETE POETRY AND

shall not pursue this subject here. Suffice it to say that the recent history of aestheticized politics—from Marinetti to Himmler to Stalin to Mao—compellingly reminds us of the danger of this omission in Nietzsche's thought.<sup>69</sup>

Metaphysical beatitude also robs us of our singularity by rendering us a part of the totalizing whole, whether it is the eternity of a culture, or the totalizing myth of the state.<sup>70</sup> But the fantasies enacted in denial fail to reduce the pressure of the unbound, surplus psychic energy that produced them. Indeed, the reasons that purport to explain the return of repressed fears and anxieties, or of unwanted desires, end up reconstituting the structure of the fantasy that operates as a means of defense. Metaphysical beatitude thus remains trapped in a cycle of endless violence and sacrifice.

By contrast, redemptive justice, like Benjamin's messianic moment, "blasts a specific life out of the era or a specific work out of the lifework."<sup>71</sup> It reclaims the singular within us. It also calls upon us to be taken up in the encounter with the other, the nearest one, the neighbor.

Bending Nietzsche's beatitude toward the ethical is an act of affirmation not simply in the face of all that is and becomes, but more fundamentally in response to the face of the other who summons our response. In this way, redemptive justice activates revelation and moves it into life.<sup>72</sup> This is the way of non-metaphysical ethics. It originates from the overflow (or *ek-static*) affirmation captured by the gravitational field generated by the countenance of the other who summons us by our proper name. That summons is tragic in its sacrificial renunciation of the third,

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COLLECTED PROSE 929-94 (1982).

<sup>68</sup> See, e.g., GEORGE KATEB, *THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE* (1992); see also THOMAS L. DUMM, *A POLITICS OF THE ORDINARY* (1999).

<sup>69</sup> This omission infects Heidegger's thought as well. It is the error that comes with assigning pre-eminent status to ontology; by dissolving beings into Being philosophy loses its grip on the ethical. As Levinas notes: "Heideggerian ontology, which subordinates the relationship with the Other to the relation with Being in general, remains under the obedience to the anonymous, and leads inevitably to another power, to imperialist domination, to tyranny." LEVINAS, *supra* note 6, at 46-47.

<sup>70</sup> See, e.g., ERNST CASSIRER, *THE MYTH OF THE STATE* (1946).

<sup>71</sup> BENJAMIN, *ILLUMINATIONS*, *supra* note 2, at 263.

<sup>72</sup> See SANTNER, *supra* note 11, at 124-25:

[Rosenzweig's *The star of Redemption*] is concerned not only with the event of revelation; it is ultimately concerned with the ways in which human beings, alone and in collectives, move out into the world, into relations of production and exchange, *on behalf of revelation*. This movement constitutes *the work of redemption*. . . .

*Id.*



but what it (realistically) lacks in regard to "the other other,"<sup>73</sup> it gains in the quality or authenticity of its practice. Non-metaphysical ethics is neither abstract nor total. The fanatic's willingness to sacrifice countless unencountered others for the sake of an idea lies outside its purview.<sup>74</sup>

When we turn away from metaphysics, the death-amplifying effect of unresolved (unassimilable) trauma may give way to the life-enhancing affirmation of the other. The legitimating source of law's command lies here, in the mutual exchange of respect between equals.<sup>75</sup> This is the essential precondition for ethical discourse; it is the condition that makes justice possible. The immanent, and ultimately contingent, nature of this ethical exchange (for nothing guarantees our response to the other's summons) authorizes judgment and roots it in time. Yet, its authority resists replication. Historical precedent remains a pale trace of its originary ethical calling. The urge to safeguard the authority of judgment, to take it out of the moment in order to secure the future, marks law's (violent) self-preserving/self-replicating impulse. This is what Benjamin refers to as mythic violence.<sup>76</sup> It reflects a revolt against the imminent decay of immanent justice as it pours itself into the mold of repeatable law. As Rosenzweig writes: "Law reckons with times, with a future,

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<sup>73</sup> See JACQUES DERRIDA, *THE GIFT OF DEATH* 68 (David Wills trans., 1995) ("I cannot respond to the call, the request, the obligation, or even the love of another without sacrificing the other other, the other others. *Every other (one) is every (bit) other, . . . every one else is completely or wholly other.*").

<sup>74</sup> Contrast Shigalov's utopian tyranny (an eerie premonition of Stalinism) in Dostoyevsky's *The Possessed*:

He offers as a final social solution the division of mankind into two uneven categories. One-tenth will be granted individual freedom and full rights over the remaining nine-tenths . . . . Gradually . . . they will attain a state of primeval innocence, something akin to the original paradise on earth. . . . The procedure . . . which would deprive nine-tenths of mankind of their free will . . . is based on data gathered from the natural sciences and is very logical.

DOSTOYEVSKY, *supra* note 23, at 385.

<sup>75</sup> See LEVINAS, *supra* note 6, at 200 ("To manifest oneself in attending one's own manifestation is to invoke the interlocutor and expose oneself to his response and his questioning."); LEVINAS, *COLLECTED PHILOSOPHICAL PAPERS*, *supra* note 18, at 43-44 ("Respect is a relationship between equals. Justice presupposes this original equality."). At the same time, however, the ethical response in itself remains asymmetrical: "[E]thics primarily signifies obligation toward the other . . . it leads to the Law and to gratuitous service . . ." *Id.* at 183 n.11. See also LEVINAS, *supra* note 6, at 215-16.

<sup>76</sup> BENJAMIN, *supra* note 1, at 249.

[T]he mythic manifestation of immediate violence shows itself fundamentally identical with all legal violence . . . . Just as in all spheres God opposes myth, mythic violence is confronted by the divine . . . . If mythic violence is lawmaking, divine violence is law-destroying; if the former sets boundaries, the latter boundlessly destroys them; if mythic violence brings at once guilt and retribution, divine power only expiates . . . .

*Id.*

with duration. The commandment knows only the moment; it awaits the result in the very instant of its promulgation."<sup>77</sup>

Law ramifies itself in fear of the unstable contingencies of its ethical origin and legitimating source. It turns against affirmative beatitude the way the neurotic shrinks in horror from his or her (impermissible) pleasure.<sup>78</sup> The unassimilable excess of desire thus repressed, symptomized in fantasies of recurring trauma, leads to the "undeadness" of law, which is to say, to metaphysical beatitude and mythical violence.<sup>79</sup> At the same time, absent the revelatory authority of contingent justice, Nietzsche's affirmative beatitude risks a "strange fire,"<sup>80</sup> a lawless passion—all too familiar fuel for the machinery of fascism's aestheticization of the political.<sup>81</sup> Conversely, if Nietzsche's excess of meaning risks a lawless passion, in the shadow-land of disenchantment law's validity risks exceeding its meaning. This is the condition of Kafka's law in a thoroughly disenchanted world.<sup>82</sup>

The contingency of law's beatitude is the price we pay for law's legitimacy. The hope of attaining and perhaps of "naturalizing"<sup>83</sup> an attitude of attentive respect (or mindfulness),

<sup>77</sup> ROSENZWEIG, REDEMPTION, *supra* note 20, at 177.

<sup>78</sup> *See id.* at 82.

<sup>79</sup> *See id.* at 104.

<sup>80</sup> *See Leviticus* 6:12. *See also* Epilogue *infra*.

<sup>81</sup> *See, e.g.,* ERIC RENTSCHLER, THE MINISTRY OF ILLUSION 21 (1996) ("If the Nazi state became a grand aesthetic construction in which 'the political itself is instituted and constituted (and regularly re-grounds itself) in and as work of art,' then it is clear that this *Gesamtkunstwerk* involved a pastiche in which politics and entertainment were inextricably bound.") (citations omitted).

<sup>82</sup> *See* KAFKA, *supra* note 9.

<sup>83</sup> On the cultivation of mindfulness, see EUGEN HERRIGAL, ZEN IN THE ART OF ARCHERY 38-41 (R.F.C. Hull trans., 1989):

[I]f he is to fit himself self-effacingly into the creative process, the practice of the art must have the way smoothed for it. For if, in his self-immersion, he saw himself faced with a situation into which he could not leap instinctively, he would first have to bring it to consciousness. He would then enter again into all the relationships from which he had detached himself; he would be like one awakened, who considers his program for the day, but not like an Awakened One who lives in the primordial state.

"[This is] why the technically learnable part of . . . [archery] must be practiced to the point of repletion. If everything depends on the archer's becoming purposeless and effacing himself in the event, then its outward realization must occur automatically, in no further need of the controlling or reflecting intelligence.

"The pupil . . . discover[s] in the course of years that forms which he perfectly masters no longer oppress but liberate."

*Id.* (cited by Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments To A Jury*, 37 N. Y. L. L. REV. 55, 118 n. 150 (1992). *See also* VARELA, *supra* note 43, at 72:

[M]astery of the skillful means of ethical expertise results in the elimination of *all* habits so that the practitioner can realize that wisdom and compassion can

while also working through our defenses (and fantasies) regarding surplus (unassimilated) pleasure, may be the only assurance to which we may legitimately aspire. Law-preserving law, law endlessly ramified, not only will not suffice, but it also risks the perfect security (and alienation) of imprisonment within Kafka's bureaucracy.

Before closing, I would like to offer a concrete illustration, as befits my theme, of what I have referred to as law's beatitude. Let us return once more to that auspicious year, 1921, this time with a legal text before us. It is the case of *Wagner v. International Railway*, handed down from the New York Court of Appeals, in an opinion penned by Judge Benjamin Cardozo.<sup>84</sup>

The case involves a claim of negligence. There has been an accident. A train, with one of its doors open, violently lurched around a bend of track on a bridge. A passenger, named Herbert Wagner, is thrown out of the car. The train continues on across the bridge and then stops. Plaintiff, Herbert's cousin, gets onto the track to search for his missing kin. It is nighttime, and he will walk four hundred and forty-five feet until he arrives at the site of his cousin's fall. I'll let Cardozo continue the narration: "Reaching the bridge, he had found upon a beam his cousin's hat, but nothing else. About him, there was darkness. He missed his footing, and fell."<sup>85</sup>

It is no trifling matter to note the human drama that is captured by Cardozo's exquisite prose. But let us pass on to the legal issue. The court below ruled that a claim of negligence against the railroad could not be sustained by this plaintiff. The problem lies with proximate cause. Relevant precedent requires a direct connection, reasonably close both in time and space, tying defendant's carelessness to plaintiff's injury. Here, however, plaintiff's choice to walk 445 feet on a track at nighttime was deemed to break the necessary causal chain. According to the court below, his death was not caused by the same carelessness that had led to his cousin's death, namely the lurch and the open door, but rather by plaintiff's own decision to set out upon the tracks and conduct his own rather lengthy investigation.

Cardozo disagrees. "Danger invites rescue," he writes.<sup>86</sup> "The cry of distress is the summons to relief . . . . The emergency begets

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arise directly and spontaneously out of wisdom. It is as if one were born already knowing how to play the violin and had to practice with great exertion in order to remove the habits that prevented one from displaying that virtuosity.

*Id.*

<sup>84</sup> *Wagner v. Int'l Ry. Co.*, 133 N.E. 437 (N.Y. 1921).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had . . . ."<sup>87</sup> Rhetorically as well as substantively, Cardozo foreshortens plaintiff's action. This foreshortening of causation is psychologically justified, Cardozo says, because "the human mind acts with celerity which it is sometimes impossible to measure."<sup>88</sup> It is also ethically justified, since plaintiff was obliged to walk "more than four hundred feet in going to Herbert's aid."<sup>89</sup>

Two words stand out here: Cardozo's use of the term "deliverer" and his repeated utterance of the proper name, "Herbert." Herbert is the summons. It is his countenance, suddenly lost from view, not the utterance of actual words, which constitutes the "cry of distress" that prompts plaintiff's act of deliverance.

In *Wagner*, Cardozo takes us into the midst of life. Lived experience, rhetorically evoked, psychologically described, and ethically justified, bears the weight of judgment.

We may recognize in Cardozo's response to the facts presented in *Wagner* another kind of summons. It is the summons of redemptive justice. Like plaintiff's response to Herbert's inaudible cry, Cardozo too responds to the immanent possibility of revelation and revelation put into practice. One might say that his judgment recapitulates in law the human response to the summons to relief that he has been called upon to judge.

It is my contention that the sincere pursuit of this aspirational ideal in everyday judgments serves as a warrant for law's legitimacy. It demonstrates the legal implications of Nietzsche's beatitude when it is drawn into the gravitational field generated by the countenance of the other, when the aesthetic turns toward the ethical.

## CONCLUSION

The will to power is not the source of evil that President Bush made it out to be shortly after 9/11. Rather, its opposite, metaphysical beatitude, the flight from life, is the danger to which we should be alerted. Nietzsche's will to power is an expression of joyous affirmation of this life, with all its contingencies and vicissitudes, here and now.

But if Nietzsche's beatitude is a worthy springboard to law's

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<sup>87</sup> *Id.* at 438.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

legitimacy, it is not enough. Law's beatitude, as a basis for legitimacy, requires an additional step, namely: the affirmation, out of plenitude, of the other close by, the neighbor, the one who summons us, and to whom we respond by the singularity of the proper name.

This response marks a shift from the purely aesthetic affirmation of Nietzsche's beatitude (love of what is in its totality) to the ethical aesthetic of law's beatitude (acknowledging the irreducible imperative of the naked countenance of the other before us). Therein lies the aspiration of law's beatitude, an aspiration that warrants law's legitimacy.

### EPILOGUE

"And Nadab and Abihu, the sons of Aaron, offered strange fire before the Lord, which he commanded them not."<sup>90</sup>

"One of law's usual functions is to hold off the Messiah."<sup>91</sup>

The story of Leviticus tells of metaphysical beatitude. It is a story of "strange fire"—a lawless excess, an enchantment without validity: On the eighth day, Moses called Aaron and his sons to make a sacrifice, which was done with all propriety. And "there came a fire out from before the Lord," and the people fell on their faces in awe and wonder. But then Aaron's eldest sons took some of the fire and mixed it with incense "and offered strange fire before the Lord, which he commanded them not. And the fire went out from the Lord and devoured them, and they died."<sup>92</sup>

In psychoanalytic terms, one might say that this narrative describes a state of over-cathected desire. It leads to unlawful enchantment, and the ultimate rebuke of divine violence. To avoid such fatal consequences, law remains necessary even (especially) in the face of messianic possibility. This is what Robert Cover has referred to as "lawful Messianism."<sup>93</sup> We have also seen that when the excess of uncatheted desire cannot be absorbed, it risks becoming traumatic, the springboard to nihilistic fantasy. Repressed desire finds its outlet in an artificial death, a state of undeadness, in which the intolerable taint of the here and

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<sup>90</sup> *Leviticus* 6:12.

<sup>91</sup> Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *CAP. U. L. REV.* 179, 196 (1985).

<sup>92</sup> *Leviticus* 6:12.

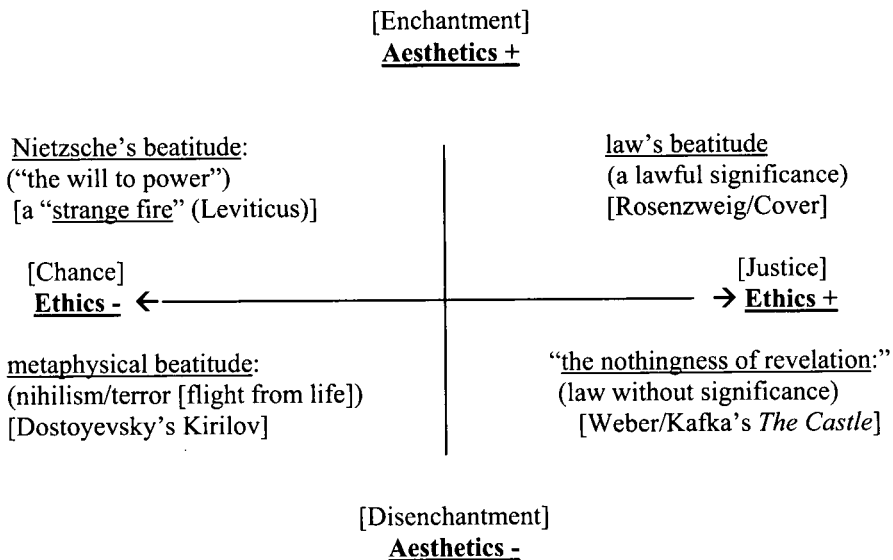
<sup>93</sup> See COVER, *supra* note 62, at 204.

now gives rise to totalized deferral: destruction of this life, and all it contains, for the sake of a better one to come. Hence, the terrorist's desire to destroy the world in order to save it.

At the other end of the ethical spectrum, disenchanting lawfulness promotes legal validity without significance. This is Kafka's world of law, endlessly and mysteriously ramified in a labyrinth of unknown origin and purpose.

For the sake of law's legitimation, we seek an enchanted ethics, a lawful significance whose origin may be traced to the "epiphany of the face."<sup>94</sup> Here we find the ethical origin of language itself—prior to all disclosure of (aesthetic) being and its "cold splendor."<sup>95</sup>

The foregoing inter-relationships between ethics and enchantment may be summarily diagrammed as follows:



<sup>94</sup> LEVINAS, *supra* note 6, at 199.

<sup>95</sup> *Id.* at 200; see also 1 WALTER BENJAMIN, *On Language as Such*, in *SELECTED WRITINGS*, VOLUME 1, 1913-1996, at 65 (Marcus Bullock & Michael W. Jennings eds., 1996) ("The name, in the realm of language, has as its sole purpose and its incomparably high meaning that it is the innermost nature of language itself.").

